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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Center for Biological Diversity, et al.,
10 Plaintiffs,

11 v.

12 Sally Jewell, et al.,
13 Defendants.

No. CV-15-00019-TUC-JGZ (l)
No. CV-15-00179-TUC-JGZ (c)
No. CV-15-00285-TUC-JGZ (c)

ORDER

14 Safari Club International, et al.
15 Plaintiffs,

16 v.

17 Sally Jewell, et al.,
18 Defendants.
19

No. CV-16-00094-TUC-JGZ

ORDER

20
21 On January 16, 2015, the United States Fish and Wildlife Service (FWS)
22 published a final agency action entitled “Revision to the Regulations for the Nonessential
23 Experimental Population of the Mexican Wolf,” pursuant to Section 10(j) of the
24 Endangered Species Act, 16 U.S.C. § 1539. The 2015 “10(j) rule” sets forth FWS’s
25 procedures for the release, dispersal, and management of the only existing wild
26 population of Mexican gray wolves in the United States. In the litigation presently before
27 this Court, four sets of Plaintiffs seek to set aside the 10(j) rule and related agency actions
28 as arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. §

1 706(2)(A).¹ Plaintiffs each allege that, in promulgating the 10(j) rule, Federal Defendants
2 violated the Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, and the National
3 Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*

4 Currently pending before the Court are twelve related cross-motions for summary
5 judgment, filed by the Plaintiffs, Federal Defendants, and Defendants-Intervenors in the
6 above captioned consolidated cases and in related case No. CV-16-00094-TUC-JGZ.²
7 The motions are fully briefed. Oral argument was held on April 26, 2017. After

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9 ¹ Case No. CV-15-00019-TUC-JGZ was filed by Plaintiffs Center for Biological
10 Diversity, *et al.* (collectively, “CBD”), on January 16, 2015. (Doc. 1.) Case No. CV-15-
11 00179-TUC-JGZ was filed by Plaintiffs Arizona and New Mexico Coalition of Counties
12 for Economic Growth, *et al.* (collectively, “the Coalition”), in the District of New Mexico
13 on February 12, 2015, and transferred to the District of Arizona on April 28, 2015. (Doc.
14 29.) It was consolidated with Case No. CV-15-00019-TUC-JGZ on May 12, 2015. (Doc.
15 35.) Case No. CV-15-00285-TUC-JGZ was filed by Plaintiffs WildEarth Guardians, *et*
16 *al.* (collectively, “WEG”), on July 2, 2015, and consolidated with the aforementioned
17 cases on July 20, 2015. (Doc. 58.) The Court consolidated these three cases for the
18 purposes of discovery and case management only. Filings for these cases can be found in
19 the docket for lead case No. CV-15-00019-TUC-JGZ.

20 Case No. CV-16-00094-TUC-JGZ was filed by Plaintiffs Safari Club
21 International, *et al.* (collectively, “SCI”), on October 16, 2015 in the District of Arizona.
22 Due to the differing stages of litigation, the Court declined to consolidate case No. CV-
23 16-00094-TUC-JGZ with the three earlier cases. (Doc. 120.) While case No. CV-16-
24 00094-TUC-JGZ is substantively related to the earlier cases, it retains its own docket.
25 Throughout this Order, citations to docket entries refer to documents filed in lead case
26 No. CV-15-00019-TUC-JGZ, unless otherwise noted.

27 ² The cross-motions for summary judgment, memoranda and statements of facts in
28 case No. CV-15-00019-TUC-JGZ are filed at docs. 114, 115, 116 (Plaintiff CBD); 123,
124, 125, 126 (Federal Defendants); and 129, 130, 131, 132 (Defendant-Intervenor State
of Arizona). The cross-motions for summary judgment, memoranda, and statements of
facts in case No. CV-15-00179-TUC-JGZ are filed at 108, 109, 110 (Plaintiff the
Coalition); 137, 138, 139, 140 (Federal Defendants); and 147, 148, 149 (Defendant-
Intervenor CBD). The cross-motions for summary judgment, memoranda and statements
of facts in case No. CV-15-00285-TUC-JGZ are filed at docs. 111, 112, 113 (Plaintiff
WEG); 133, 134, 135, 136 (Federal Defendants); and 141, 142, 143, 144 (Defendant
Intervenor State of Arizona). The cross-motions for summary judgment, memoranda and
statements of facts in case No. CV-16-00094-TUC-JGZ are filed in that case’s docket at
docs. 67, 68, 69 (Plaintiff SCI); 70, 71, 72, 73 (Federal Defendants); and 78, 79
(Defendant-Intervenor CBD).

1 consideration of the parties' arguments and the administrative record in this case, and for
2 the reasons discussed herein, the Court will grant the motions in part, deny the motions in
3 part, and remand this matter to FWS for further consideration consistent with this Order.

4 **STANDARDS OF REVIEW**

5 **I. Summary Judgment**

6 Summary judgment is appropriate if the pleadings and supporting documents
7 "show that there is no genuine issue as to any material fact and that the moving party is
8 entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*,
9 477 U.S. 317, 322 (1986). A court presented with cross-motions for summary judgment
10 should review each motion separately, giving the nonmoving party for each motion the
11 benefit of all reasonable inferences from the record. *Ctr. for Bio-Ethical Reform, Inc. v.*
12 *Los Angeles Cnty. Sheriff Dep't*, 533 F.3d 780, 786 (9th Cir. 2008). "Summary judgment
13 is a particularly appropriate tool for resolving claims challenging agency action."
14 *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207, 1215 (D. Mont. 2010). In such
15 cases the Court's role is not to resolve facts, but to "determine whether or not as a matter
16 of law the evidence in the administrative record permitted the agency to make the
17 decision it did." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985).³

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20 ³ Several of the parties filed controverting statements of facts. (See docs. 128, 132,
21 136, 140, 144, 149, 154, 156, 157; docs. 83, 84 in case No. CV-16-00094-TUC-JGZ.)
22 Upon review, the Court concludes that the facts are not in dispute; rather, the parties
23 dispute the legal significance of the facts. The content and accuracy of the administrative
24 record is also undisputed. Therefore, this case is appropriate for resolution by summary
25 judgment. See *Occidental Eng'g Co.*, 753 F.2d at 769-70 (noting that in its review of an
26 administrative proceeding the district court decides the legal question of whether the
27 agency could reasonably have found the facts as it did).

28 The Amended Administrative Record (AR) in the above-captioned consolidated
cases is identical to the Administrative Record filed in related case No. CV-16-00094-
TUC-JGZ. (See doc. 100; docs. 39–41 in case No. CV-16-00094-TUC-JGZ.) Many of the
AR documents cited by the Court are also published in the Federal Register or codified in
the Code of Federal Regulations. For the purposes of setting forth the undisputed facts,
the Court has elected to include only the AR citation.

II. The Administrative Procedure Act

Judicial review of agency actions under the Endangered Species Act and the National Environmental Policy Act is governed by the Administrative Procedure Act (APA). *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002). Under APA Section 706(2), the court may set aside agency action where it is found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with applicable law. 5 U.S.C. § 706(2)(A). “Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

In order to determine whether an agency action is arbitrary and capricious, a reviewing court looks to the evidence the agency has provided to support its conclusions, along with other materials in the record, to ensure the agency made no clear error of judgment. *See Judulang v. Holder*, 565 U.S. 42, 52–53 (2011); *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008), *overruled on other grounds by Am. Trucking Assns., Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). That task involves examining the reasons for agency decisions, which must be based on non-arbitrary, relevant factors that are tied to the purpose of the underlying statute. *See Judulang*, 565 U.S. at 53, 55. The agency must articulate a rational connection between the facts found and the choice made. *Forest Guardians v. United States Forest Serv.*, 329 F.3d 1089, 1099 (9th Cir. 2003). Post hoc explanations of agency action by appellate counsel cannot substitute for the agency’s own articulation of the basis for its decision. *Arrington v. Daniels*, 516 F.3d 1106, 1113 (9th Cir. 2008) (citing *Fed. Power Comm’n v. Texaco, Inc.*, 417 U.S. 380, 397 (1974)). Similarly, the reviewing court “may not supply a reasoned basis for the agency’s action that the agency itself has not given.” *Motor Vehicle Mfrs.*

1 Ass’n, 463 U.S. at 43. Rather, the court’s review is “limited to the explanations offered by
2 the agency in the administrative record.” *Arrington*, 516 F.3d at 1113.

3 “The arbitrary and capricious standard is ‘highly deferential, presuming the
4 agency action to be valid and [requires] affirming the agency action if a reasonable basis
5 exists for its decision.’” *Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir.
6 2006) (quoting *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir.
7 2000)). When examining scientific determinations, as opposed to simple findings of fact,
8 a reviewing court must generally be at its most deferential. *Baltimore Gas & Elec. Co. v.*
9 *Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). This is particularly true when
10 the scientific findings are within the agency’s area of expertise. *See Lands Council*, 537
11 F.3d at 993. Moreover, “[w]hen not dictated by statute or regulation, the manner in which
12 an agency resolves conflicting evidence is entitled to deference so long as it is not
13 arbitrary and capricious.” *Trout Unlimited v. Lohn*, 559 F.3d 946, 958 (9th Cir. 2009).

14 Nevertheless, the APA requires a “substantial inquiry” to determine whether the
15 agency acted within the scope of its authority. *Citizens to Pres. Overton Park, Inc. v.*
16 *Volpe*, 401 U.S. 402, 415 (1971), *abrogated on other grounds by Califano v. Sanders*,
17 430 U.S. 99 (1977). Thus, although the agency is entitled to a “presumption of
18 regularity,” the effect of that presumption is not to shield the agency’s action from a
19 “thorough, probing, in-depth review,” and the court’s inquiry into facts should be
20 “searching and careful.” *Id.*

21 **STATUTORY BACKGROUND**

22 **I. The Endangered Species Act**

23 Passed in 1973, the Endangered Species Act (ESA or “the Act”), 16 U.S.C.
24 § 1531, *et seq.*, sets forth a comprehensive scheme for the protection of endangered and
25 threatened species in the United States. *Cal. ex rel. Lockyer v. United States Dep’t of*
26 *Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009). Under the ESA, the Secretary of the Interior
27 must identify endangered species, designate their critical habitats, and develop and
28 implement recovery plans. *Natural Res. Def. Council, Inc. v. United States Dept. of*

1 *Interior*, 13 F. App'x 612, 615 (9th Cir. 2001). An “endangered species” is a species or
2 subspecies which is “in danger of extinction throughout all or a significant portion of its
3 range.” 16 U.S.C. § 1532(6), (16). A “threatened species” is a species or subspecies that
4 “is likely to become an endangered species within the foreseeable future throughout all or
5 a significant portion of its range.” *Id.* § 1532(20). The Secretary’s duties under the ESA
6 are delegated to FWS pursuant to 50 C.F.R. § 402.01(b).

7 Described by the Supreme Court as “the most comprehensive legislation for the
8 preservation of endangered species ever enacted by any nation,” the ESA reflects
9 Congress’s desire “to halt and reverse the trend toward species extinction, whatever the
10 cost.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Congress pronounced the
11 purpose of the ESA to be the conservation of listed species and the ecosystems upon
12 which they depend, 16 U.S.C. § 1531(b), and declared a policy that all federal agencies
13 shall utilize their authorities in furtherance of this purpose. 16 U.S.C. § 1531(c)(1). Thus,
14 the ESA “reflects a conscious decision by Congress” to give listed species primacy over
15 the primary missions of federal agencies, *Lockyer*, 575 F.3d at 1018, and to afford those
16 species “the highest of priorities.” *Or. Natural Res. Council v. Allen*, 476 F.3d 1031,
17 1033 (9th Cir. 2007).

18 “Conservation,” also referred to as “recovery,” is at the heart of the ESA.
19 Conservation is defined as “the use of all methods and procedures which are necessary to
20 bring any endangered species or threatened species to the point at which the measures
21 provided [by the ESA] are no longer necessary.” *Sierra Club v. United States Fish &*
22 *Wildlife Serv.*, 245 F.3d at 438 (citing 16 U.S.C. § 1532(3)). It is the “process that stops
23 or reverses the decline of a species and neutralizes threats to its existence.” *Ctr. for*
24 *Biological Diversity v. Kempthorne*, 607 F. Supp. 2d 1078, 1088 (D. Ariz. 2009) (quoting
25 *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 131 (D.D.C. 2001)).⁴ The ESA’s

26 ⁴ “Recovery” is defined in the implementing regulations as the “improvement in
27 the status of listed species to the point at which listing is no longer appropriate under the
28 criteria set out in section 4(a)(1) of the Act.” 50 C.F.R. § 402.02. For the purposes of this
Order, the Court uses the terms “conservation” and “recovery” interchangeably.

1 conservation purpose “is reflected not only in the stated policies of the Act, but in
2 literally every section of the statute.” *Babbitt v. Sweet Home Chapter of Cmities. for a*
3 *Great Or.*, 515 U.S. 687, 699 (1995) (quoting *Hill*, 437 U.S. at 184); *see also Red Wolf*
4 *Coal. v. United States Fish & Wildlife Serv.*, 210 F. Supp. 3d 796, 803 (E.D.N.C. 2016).

5 In carrying out its conservation mandate, FWS must consider the long term
6 viability of the species. To this end, the agency may not ignore recovery needs and focus
7 entirely on survival. *See Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d
8 917, 932 (9th Cir. 2008). Rather, recovery envisions self-sustaining populations that no
9 longer require the protections or support of the Act. *Gifford Pinchot Task Force v. United*
10 *States Fish and Wildlife Serv.*, 378 F.3d 1059, 1070 (“[T]he ESA was enacted not merely
11 to forestall the extinction of species (i.e., promote a species survival), *amended*, 387 F.3d
12 968 (9th Cir. 2004), but to allow a species to recover to the point where it may be
13 delisted.”); *Sierra Club v. United States Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th
14 Cir. 2001) (“[T]he objective of the ESA is to enable listed species not merely to survive,
15 but to recover from their endangered or threatened status.”).

16 In addition, the agency must determine recovery based on the viability of species,
17 not in captivity but in the wild. “In enacting the Endangered Species Act, Congress
18 recognized that individual species should not be viewed in isolation, but must be viewed
19 in terms of their relationship to the ecosystem of which they form a constituent element.”
20 H.R. Conf. Rep. No. 97-835, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2871;
21 H.R. Rep. 95-1625, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9455 (purpose of
22 ESA is not only to reduce threats to the species’ existence, but “to return the species to
23 the point where they are viable components of their ecosystems.”). Or, as the Ninth
24 Circuit explained, “the ESA’s primary goal is to preserve the ability of natural
25 populations to survive in the wild.” *Trout Unlimited*, 559 F.3d at 957; *accord Cal. State*
26 *Grange v. Nat. Marine Fisheries Serv.*, 620 F. Supp. 2d 1111, 1156–57 (E.D. Cal 2008).
27 Thus, while the agency may rely on captive populations to reestablish a species in the
28 wild, the goal of recovery is “to promote populations that are self-sustaining without

1 human interference.” *Trout Unlimited*, 559 F.3d at 957.

2 The ESA contains multiple sections, each governing a piece of the Act’s
3 comprehensive scheme for the listing, management, and protection of endangered
4 species. Sections 10(j) and 10(a)(1) are relevant to the Court’s conclusions herein and are
5 summarized below.

6 **A. Section 10(j): Experimental Populations**

7 In 1982, Congress amended the ESA to include Section 10(j), 16 U.S.C. § 1539(j),
8 which established procedures for the designation and management of “experimental
9 populations.” 49 Fed. Reg. 33,885, 33,885 (Aug. 27, 1984). Under Section 10(j), the
10 Secretary of the Interior may authorize the release of an experimental population of an
11 endangered species outside the species’ current range if the Secretary determines that the
12 release will further the conservation of that species. *See* 16 U.S.C. § 1539(j). An
13 “experimental population” is defined as “any population (including any offspring arising
14 solely therefrom) authorized by the Secretary for release . . . , but only when, and at such
15 times as, the population is wholly separate geographically from nonexperimental
16 populations of the same species.” *Id.* § 1539(j)(1). Once designated, an experimental
17 population is treated as “threatened” under the Act, irrespective of the species’
18 designation elsewhere. 50 C.F.R. § 17.82; *see* 49 Fed. Reg. at 33,885.

19 A Section 10(j) rule is issued in accordance with the APA, which affords the
20 benefit of public comment and serves to address the needs of each particular population
21 proposed for designation. *Wyo. Farm Bureau Fed’n v. Babbitt*, 199 F.3d 1224, 1232
22 (10th Cir. 2000) (citing H.R. Conf. Rep. No. 97-835 (1982), *reprinted in* 1982
23 U.S.C.C.A.N. 2860, 2875); 49 Fed. Reg. at 33,886. Before releasing an experimental
24 population under Section 10(j), the Secretary must also develop regulations identifying
25 the experimental population, 16 U.S.C. § 1539(j)(2)(B), the geographic area where the
26 regulations apply, 50 C.F.R. § 17.81(c)(1), and the specific management restrictions that
27 apply to the population. *Id.* § 17.81(c)(3). The regulations are species-specific and are
28 developed on a case-by-case basis. 49 Fed. Reg. at 33,886. Once the regulations are

1 finalized and published, the management and conservation of the population is then
2 carried out by FWS in conjunction with other management agencies, including county,
3 state, tribal, and federal entities, often pursuant to a memorandum of understanding
4 signed by all parties. *Id.*

5 Before designating an experimental population, the Secretary must make two
6 specific findings. *United States v. McKittrick*, 142 F.3d 1170, 1176 (9th Cir. 1998). First,
7 an experimental population may only be released if the Secretary finds the release will
8 “further the conservation of [the] species.” 16 U.S.C. § 1539(j)(2)(A). Factors that must
9 be considered by the Secretary in making this finding include:

- 10 (1) Any possible adverse effects on extant populations of a species as a
11 result of removal of individuals, eggs, or propagules for introduction
elsewhere;
- 12 (2) The likelihood that any such experimental population will become
13 established and survive in the foreseeable future;
- 14 (3) The relative effects that establishment of an experimental population
will have on the recovery of the species; and
- 15 (4) The extent to which the introduced population may be affected by
16 existing or anticipated Federal or State actions or private activities
within or adjacent to the experimental population area.

17 50 C.F.R. § 17.81(b). The Secretary is required to make this determination using the best
18 scientific and commercial data available. *Id.*

19 Second, prior to releasing an experimental population, the Secretary must
20 determine whether the population is essential to the continued existence of the species in
21 the wild. 16 U.S.C. § 1539(j)(2)(B); *see also* 50 C.F.R. § 17.81(c)(2). “Essential” means
22 the experimental population’s loss “would be likely to appreciably reduce the likelihood
23 of the survival of the species in the wild.” 50 C.F.R. § 17.80(b). All other populations are
24 to be classified as “nonessential.” *Id.* The essentiality finding must be “based solely on
25 the best scientific and commercial data available, and the supporting factual basis[.]” *Id.*
26 § 17.81(c)(2). Congress anticipated that in most cases experimental populations would be
27 nonessential. S. Rep. No. 97-418, at 9 (1982). This is because the loss of a single
28 experimental population will rarely appreciably reduce the likelihood of the entire

1 species' or parent populations' survival in the wild. *See* 49 Fed. Reg. at 33,888. Whether
2 a population is designated "essential" or "nonessential" affects whether federal agencies
3 have a duty to consult with FWS on certain federal actions under ESA Section 7(a)(2).
4 Where a population is designated "nonessential," federal agencies are not required to
5 formally consult with FWS on actions likely to jeopardize the continued existence of the
6 species. 16 U.S.C. § 1536(a)(2). Instead, federal agencies must engage in a conferral
7 process that results in conservation recommendations that are not binding upon the
8 agency. *Id.* § 1536(a)(4). Additionally, the Secretary may not designate critical habitat for
9 an experimental population designated as nonessential. *Id.* § 1539(j)(2)(C)(ii). To date,
10 the "essential" designation has never been applied to an experimental population of any
11 species. *See* 50 C.F.R. §§ 17.11, 17.84.

12 As with the other provisions of the ESA, conservation and recovery are at the
13 heart of Section 10(j). *See Defs. of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095, 1117 (D.
14 Ariz. 2009) ("USFWS has a non-discretionary duty to ensure that the Final Rule for the
15 Reintroduction Program, 50 C.F.R. § 17.84(k), provides for conservation of the Mexican
16 Wolf."). Congress enacted Section 10(j) in 1982 as a means of giving greater
17 administrative flexibility to the Secretary in managing reintroduced species. Although
18 Section 10(j) permits the Secretary to treat the species as threatened, irrespective of the
19 species' designation elsewhere, 49 Fed. Reg. at 33,886, 33,889, Congress believed that
20 this flexibility would facilitate the reintroduction effort and enhance recovery efforts. *See*
21 H.R. Rep. No. 97-567, at 33 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2833; 49 Fed.
22 Reg. at 33,887–88; *McKittrick*, 142 F.3d at 1174 (management flexibility afforded under
23 Section 10(j) "allows the Secretary to better conserve and recover endangered species").
24 The use of Section 10(j) was accordingly limited to "those instances where the involved
25 parties are reluctant to accept the reintroduction of an endangered or threatened species
26 without the opportunity to exercise greater management flexibility on the introduced
27 population." 49 Fed. Reg. at 33,888–89. Even in such cases, the experimental designation
28 would only be applied when "necessitated by the conservation and recovery needs of a

1 listed species,” and an experimental designation based on nonconservation purposes
2 would not be supported. *Id.* at 33,889.

3 **B. Section 10(a)(1): Permits**

4 Under Section 10(a)(1)(A) of the ESA, the Secretary may permit actions otherwise
5 prohibited by Section 9 of the Act for scientific purposes or to enhance the propagation or
6 survival of the affected species. 16 U.S.C. § 1539(a)(1)(A). The Secretary’s authority
7 includes issuing permits for actions necessary for the establishment and maintenance of
8 experimental populations. *Id.* The permits may authorize lethal or nonlethal “take,” which
9 means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to
10 attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). As with the other
11 provisions of the Act, the issuance of individual permits must not conflict with recovery
12 of the species as a whole. “[T]he Secretary is subject to the requirement of Section 10(d)
13 that issuance will not operate to the disadvantage of the listed species,” and the permit
14 issued must be consistent with the ESA’s conservation purpose and policy. S. Rep. No.
15 97-418 at 8; 16 U.S.C. § 1539(d).

16 **FACTUAL BACKGROUND**

17 A subspecies of the gray wolf, the Mexican gray wolf or “Mexican wolf” (*Canis*
18 *lupus baileyi*) is native to the forested and mountainous terrain of the American
19 Southwest and northern Mexico. (Revision to the Regulations for the Nonessential
20 Experimental Population of the Mexican Wolf (January 16, 2015), AR FR000136 at
21 FR000138 (hereinafter 2015 10(j) Rule).) The Mexican wolf is relatively small, weighing
22 between 50 and 90 pounds and measuring up to six feet in length. It is patchy black,
23 brown, cinnamon, and cream in color. (*Id.*) It is the rarest and most genetically distinct
24 subspecies of all the North American gray wolves. (Final Environmental Impact
25 Statement (Nov. 25, 2014), AR N042613 at N042617 (hereinafter FEIS).) A wanderer
26 and a forager, Mexican wolves may roam across many square miles of available habitat.
27 (1982 Mexican Wolf Recovery Plan, R000887 at R000894, R000905 (hereinafter 1982
28 RP).) The Mexican wolf preys principally on elk and other wild ungulates, but will also

1 eat small mammals or birds and prey or scavenge on livestock. (*Id* at R000894; 2015
2 10(j) Rule at FR000138.)

3 Though historically numbering in the thousands, by the 1970s the Mexican wolf
4 hovered on the brink of extinction. (2015 10(j) Rule at FR000138.) Like other North
5 American wolves, the Mexican wolf was much maligned during the twentieth century,
6 due to “its reputation as a livestock killer.” (Establishment of a Nonessential
7 Experimental Population of the Mexican Wolf in Arizona and New Mexico (January 12,
8 1998), AR FR000001 at FR000001 (hereinafter 1998 10(j) Rule).) In the American
9 Southwest, concerted eradication efforts by both public and private entities commenced
10 around the turn of the century, resulting in a rapid reduction in Mexican wolf numbers.
11 (See 1982 RP at R000895–96; 2010 Conservation Assessment, AR N052264 at N052283
12 (hereinafter 2010 CA).) By the 1920s the Southwest’s population of resident wolves had
13 been reduced to “a very few scattered individual predators.” (1982 RP at R000896.)
14 Though occasionally wolves reappeared in Arizona and New Mexico, the product of
15 migration from Mexico, “increasingly effective poisons and trapping techniques during
16 the 1950s and 1960s” effectively eliminated remaining wolves north of the Mexican
17 border. (2010 CA at N052283-84; 1982 RP at R000896.) “No wild wolf has been
18 confirmed since 1970,” and the subspecies was thought to be completely extirpated from
19 its historic range by the 1980s. (2015 10(j) Rule at FR000138.)

20 In the late 1970s and early 1980s, the United States and Mexico formally
21 commenced efforts to save the Mexican wolf from extinction. (2014 FEIS at N042655–
22 56.) In 1976, the Mexican wolf was first listed under the ESA as an endangered
23 subspecies.⁵ (2015 10(j) Rule at FR000137.) In 1977, a binational program aimed at

24 ⁵ In 1978, the subspecies listing was subsumed by the designation of the entire
25 gray wolf species as endangered throughout North America, with the exception of
26 Minnesota, where the species was listed as threatened. In 2015, the Mexican wolf was
27 again listed as an endangered subspecies. See 80 Fed. Reg. 2488 (Jan. 16, 2015); 50
28 C.F.R. § 17.11(h). In spite of the changes in legal designation, the Mexican wolf has
continuously been recognized as a separate subspecies for the purposes of research and
conservation. (See 2015 10(j) Rule at FR000137.)

1 growing and maintaining a captive population of Mexican wolves was initiated, and in
2 1981 captive breeding officially began. (*See id.* at FR000139; 1998 10(j) Rule at
3 FR000002; 2010 CA at N052270.) All Mexican wolves alive today originated from the
4 seven founding wolves that by 1980 constituted the last of the subspecies. (*See* FEIS at
5 N042656.)

6 1982 Recovery Plan

7 In 1982, in accordance with Section 4(f) of the ESA, FWS published the first
8 Mexican Wolf Recovery Plan, which created a five-part step-down plan for the
9 implementation of the captive breeding program and the eventual reestablishment of wolf
10 populations in the wild. (*See* 1982 RP at R000887, *et seq.*) Written against a backdrop of
11 near-extinction, the 1982 Recovery Plan did not provide criteria for delisting the Mexican
12 gray wolf. (*Id.* at R000913; 2010 CA at N052270; 2015 10(j) Rule at FR000138.)
13 Rather, the recovery team determined that the more “realistic” course of action was to set
14 a limited goal of ensuring the wolf’s survival by “re-establishing a viable, self-sustaining
15 population of at least 100 Mexican wolves in the middle to high elevations of a 5,000-
16 square-mile area within the Mexican wolf’s historic range.” (1982 RP at R000913; *see*
17 *also* Mexican Wolf Blue Range Reintroduction Project 5-Year Review (Dec. 31, 2005),
18 AR N000556 at N000574 (hereinafter 5-Yr Review).) At that time, the reintroduction of
19 the subspecies to the wild was seen as a remote possibility, to be taken in the “unseeable
20 future,” and the recovery team’s recommendations were accordingly made with the
21 caveat that future revisions to the plan would be necessary to fully implement
22 reintroduction and recover the species. (*See* 1982 RP at R000891.)

23 Over the next several decades, FWS continued to breed wolves in facilities
24 throughout the United States and Mexico. (*See, e.g.*, 2015 10(j) Rule at FR000139.)
25 Though by 1997 the captive population had grown to 148 wolves, no wolves had been
26 released back into the wild, due in large part to controversy surrounding reintroduction.
27 (5-Yr Review at N000559.) As FWS noted, the Mexican wolf reintroduction was
28 “prominent in the American public’s eye” long before reintroduction plans formally

1 commenced. (*Id.*) The questions of “[w]hether reintroduction and recovery should be
2 allowed, and if so where and how, were hotly debated through the 1990s[.]” (*Id.*)
3 Eventually, in response to litigation against FWS by seven environmental organizations
4 for failure to implement provisions of the ESA, FWS finalized a Section 10(j) rule to
5 reintroduce the Mexican wolf to the wild. (*See* 2010 CA at N052285.)

6 1998 10(j) Rule

7 Like the 1982 Recovery Plan, the 1998 10(j) rule did not purport to set forth
8 criteria sufficient for the recovery of the Mexican wolf. Rather, consistent with the 1982
9 Recovery Plan, the goal of the 1998 rule was to restore a self-sustaining population of
10 100 Mexican wolves to the wild. (1998 10(j) Rule at FR000001; 2010 CA at N052286;
11 Mexican Wolf Recovery: Three-Year Program Review and Assessment (June 2001), AR
12 N046730 at N046737 [hereinafter 3-Yr Review].) This number was deemed a “starting
13 point to determine whether or not [FWS] could successfully establish a population of
14 Mexican wolves in the wild that would conserve the species and lead to its recovery.”
15 (2015 10(j) Rule at FR000150.) As in years prior, FWS anticipated that recovery
16 objectives, including a population goal sufficient for delisting, would be defined in a
17 future, revised recovery plan. (*Id.* at FR000002.)

18 In March 1998, pursuant to the 1998 10(j) rule, eleven wolves were released into
19 the Blue Range Wolf Recovery Area (BRWRA), constituting the first reintroduction of
20 the subspecies into the wild. (*See* 1998 10(j) Rule at FR000003.) The rule designated the
21 population as “nonessential experimental” and set forth management directives for the
22 population. (*Id.*) The rule contemplated that 14 family groups of wolves would be
23 released over the course of five years into the BRWRA, a 6,854 square-mile stretch of
24 primarily national forest land spanning central Arizona and New Mexico. (*Id.* at
25 FR000003.) The BRWRA was contained within the larger Mexican Wolf Experimental
26 Population Area (MWEPA), which was a geographic area used to identify members of
27 the population; the MWEPA was not designated as an area for release or translocation of
28 wolves. (*Id.* at FR000002.) Although the 1998 10(j) rule set a population goal of 100

1 wolves, authorized agencies could take, remove, or translocate wolves in specified
2 circumstances, and private citizens were given “broad authority” to harass wolves for
3 purposes of scaring them away from people, buildings, pets, and livestock. (*Id.* at
4 FR000003–04.) Killing or injuring wolves was permitted in defense of human life or
5 livestock. (*Id.*)

6 In the 1998 rule, FWS designated the experimental population as “nonessential.”
7 (*Id.* at FR000004.) FWS found that the nonessential designation was appropriate because
8 only genetically “redundant” wolves from the captive breeding program would be
9 released into the wild. FWS reasoned that the loss of the experimental population would
10 not significantly affect the likelihood of the survival of the captive population, and that
11 this was true, even though the total population of the subspecies would not constitute a
12 minimum viable population under conservation biology principles. (*Id.* at FR000005-06;
13 2010 CA at N052286.) FWS also found that the “nonessential” designation was
14 necessary to obtain needed state, tribal, local, and private cooperation and would allow
15 for additional “management flexibility” in response to negative impacts, such as livestock
16 depredation. (1998 10(j) rule at FR000004; 2010 CA at N052286.) Without such
17 flexibility, FWS reasoned, intentional illegal killing of wolves likely would harm the
18 prospects for success. (*Id.*) FWS indicated that it did not intend to change the
19 population’s status to “essential” and could foresee “no likely situation which would
20 result in such changes in the future.” (1998 10(j) rule at FR000004; *see also* 2010 CA at
21 N052286.)

22 *Identification of the Need for Improvement to Wolf Recovery*

23 Over the next 17 years, with no published recovery criteria in place, the Mexican
24 wolf recovery and reintroduction programs continued to be implemented in accordance
25 with the 1982 Recovery Plan and the 1998 10(j) Rule. Progress toward the 100-wolf
26 population goal was slower than anticipated (*see* FEIS at N042671; 2015 10(j) Rule at
27 FR000175), and efforts to improve the program’s regulatory framework were largely
28

1 unsuccessful.⁶ (See 2010 CA at N052273; 3-Yr Review at N046797-N046804.) Public
2 opposition to the reintroduction program remained strong.⁷ By the time FWS published
3 its 2010 Conservation Assessment, there had been no formal changes to the
4 reintroduction program, and the agency again noted the need for regulatory
5 improvements. (See 2010 CA at N052273.) Although in the 2010 Conservation
6 Assessment, FWS determined that public opinion was not a threat to the Blue Range
7 population, illegal shooting of wolves remained the single greatest source of wolf
8 mortality in the reintroduced population, accounting for almost half of all deaths between
9 1998 and June 1, 2009. (*Id.* at N052273–74.)

10 Meanwhile, efforts to revise the 1982 Mexican Wolf Recovery Plan were similarly
11 unsuccessful. FWS convened teams to revise the recovery plan in the early 1990s and
12 early 2000s, but without success. (1998 10(j) Rule at FR000002; 5-Yr Review at
13 N000559; 2010 CA at N052270–71.) In 2010, FWS convened a third wolf recovery team.
14 (See Draft Mexican Wolf Revised Recovery Plan, AR C043009, *et seq.*, [hereinafter 2012
15 Draft RP].) That team, comprised of leading wolf scientists, drafted a Mexican Wolf
16 Revised Recovery Plan in full. (See *id.*) However, FWS thereafter halted the recovery
17 planning process, and the draft was never published. (See AGFD Letter to FWS (Sept. 23,
18 2014), AR C085274 at C085281–82; Email from Tracy Melbiess (Oct. 23, 2013), AR
19 N077606 at N077606.)

20 2015 10(j) Rule

21 Litigation in 2010 prompted revision to the 1998 10(j) rule. In settlement of
22 *Center for Biological Diversity v. Jewell*, No. 1:12-CV-1920 (D.D.C. 2013), FWS agreed
23

24 ⁶ For example, FWS’s 2005 Five-Year Review observed that recommendations
25 from the agency’s Three-Year Review had not been implemented. (5-Yr Review at
N000559–60.)

26 ⁷ Over 10,000 comments were received in conjunction with the Five-Year Review
27 and the review team found that a significant portion of the population had “strongly held
28 attitudes toward wolves in the BRWRA,” both in support of and in opposition to wolf
reintroduction. (5-Yr Review N000559–60, N000856.) The team noted the vehemence
with which these groups held their position on the wolf and the anger they held for the
opposition. (*Id.*)

1 to publish a 10(j) rule modification by January 16, 2015. (Doc. 22 in case No. 1:12-CV-
2 1920; *see* Email from Jonathan Olson (Dec. 16, 2013), AR N006047, *et seq.*) In 2013, in
3 anticipation of this deadline, FWS commenced the public scoping process required by
4 federal law. As part of this process, the agency solicited peer review opinions from six
5 scientists with expertise that included familiarity with wolves, the geographic region in
6 which wolves occur, and conservation biology principles. (2015 10(j) Rule at FR000137,
7 FR000150.) FWS invited 84 federal and state agencies, local governments, and tribes to
8 participate as cooperating agencies in the development of the environmental impact
9 statement, 27 of which participated. (*Id.* at FR000158.) FWS maintained a list of
10 individual stakeholders and a Web site to ensure that interested and potentially affected
11 parties received information on the EIS. (*Id.*) In November 2014, following additional
12 opportunity for public comment, FWS published the Final Environmental Impact
13 Statement (FEIS), which analyzed four alternatives for improving the effectiveness of the
14 reintroduction program. (*See* FEIS at N042619–21, N042688.) On January 6, 2015, FWS
15 issued a Record of Decision, selecting Alternative One as the preferred alternative.
16 (Record of Decision, AR N034602, *et seq.*) Alternative One contained the following key
17 provisions.

18 1. Population Cap and Effective Migration Rate

19 The rule sets a population objective of a single population of 300–325 Mexican
20 wolves within the MWEPA, with a minimum one to two effective migrants per
21 generation entering the population, depending on its size, over the long term. (2015 10(j)
22 Rule at FR000141.) Although FWS does not expect to reach the 300–325-wolf objective
23 until after year 13 (2014 FEIS at N043054), FWS nevertheless concluded the population
24 objective “would provide for the persistence of [the] population and enable it to
25 contribute to the next phase of working toward full recovery of the Mexican wolf and its
26 removal from the endangered species list.” (2015 10(j) Rule at FR000138–39A).
27 Additionally, “[i]n the more immediate future, FWS may conduct additional releases in
28 excess of 1–2 effective migrants per generation to address the high degree of relatedness

1 of wolves in the current BRWRA.” (*Id.* at FR000141.) Finally, so as not to exceed the
2 population objective, FWS will exercise “all management options,” with a preference for
3 translocation. (*Id.* at FR000173.) In support of the population objective, FWS relied upon
4 two scientific studies: Carroll, et al. (2014) and Wayne and Hedrick (2010).

5 2. Expanded MWEPA

6 The rule also expands the MWEPA to encompass all of Arizona and New Mexico
7 south of Interstate 40 (“I-40”), totaling 153,871 square miles. (*Id.* at FR000143.) The
8 term “BRWRA” was discontinued, and the MWEPA was divided geographically into
9 three zones, each designated for the release, translocation, or dispersal of wolves. (*Id.* at
10 FR000144, FR000147.) In Zone 1, Mexican wolves may be initially released or
11 translocated. In Zone 2, Mexican wolves will be allowed to naturally disperse and
12 occupy, and wolves may be translocated within the zone. Pups under five months of age
13 will be released on federal land in Zone 2. In Zone 3, neither initial releases nor
14 translocations will occur, but Mexican wolves will be allowed to disperse into and
15 occupy this zone. Zone 3 is an area of less suitable Mexican wolf habitat where Mexican
16 wolves will be more actively managed to reduce conflict with the public. (*Id.* at
17 FR000143–48.) Unlike the BRWRA, which included principally national forest land, the
18 expanded MWEPA includes a significant amount of non-federal land. (*Id.* at FR000149.)
19 The rule does not authorize the use of suitable wolf habitat north of I-40. FWS explained
20 that expansion north of I-40 would require coordination with Utah and Colorado and
21 must be implemented through a revised recovery plan. (*Id.* at FR000162, FR000164.)

22 3. Expanded Take Provisions

23 The 2015 rule modifies the circumstances in which lethal and nonlethal take are
24 authorized, with the aim to provide greater management flexibility and “make
25 reintroduction compatible with current and planned human activities, such as livestock
26 grazing and hunting.” (*Id.* at FR000148–49.)

27 Most notably, the rule authorizes lethal and non-lethal take in response to
28 unacceptable impacts to wild ungulate herds. If an Arizona or New Mexico game and fish

1 agency determines that Mexican wolf predation is having an unacceptable impact to a
2 wild ungulate herd, the respective agency may request approval from FWS that the
3 wolves be removed from the impacted area. (*Id.*) Along with its request, the state agency
4 must submit a science-based document that has been subjected to peer-review and public
5 comment, describing what data indicate that the wild ungulate herd is below management
6 objectives and demonstrating that attempts were made to identify other causes of herd
7 declines. (Permit at P000668–69.) An “unacceptable impact” is determined by the state
8 game and fish agency, based upon ungulate management goals, or a 15 percent decline in
9 an ungulate herd as documented by the state agency using its preferred methodology.
10 (2015 10(j) Rule at FR000173.) If all of the requirements are met, FWS will “to the
11 maximum extent allowable under the Act, make a written determination of what
12 management action is most appropriate for the conservation of the subspecies.” (*Id.* at
13 FR000168; 50 C.F.R. § 17.84(k)(7)(C).) In the FEIS, FWS reported that, since
14 reintroduction commenced, state-collected data demonstrates that there has been “no
15 discernable impact” from Mexican wolf predation on elk in the BRWRA. (2014 FEIS at
16 N043840.) FWS further projected that wolves would have “little or no effect on the
17 abundance of elk and deer across most of Arizona and New Mexico where elk and deer
18 abundance is stable, or above population objectives.” (*Id.* at N042840.)

19 4. Nonessential Designation

20 Finally, the 2015 rule maintains the experimental population’s “nonessential”
21 status, which was first designated in the 1998 rulemaking. In support of this decision,
22 FWS noted the Mexican wolf population that is in the wild in Arizona and New Mexico
23 today is the same population that was designated in the 1998 final rule. (2015 10(j) Rule
24 at FR000163.) FWS reasoned that because the purpose of the 2015 rule is to revise
25 management protocols for an existing population, reconsideration of the population’s
26 nonessential status was “outside the scope” of the rulemaking. (*Id.*)

27 Scientists’ Response to FWS’s Selection of Alternative One

1 Prior to FWS's publication of the 2015 10(j) rule, a group of scientists informed
2 FWS, through submission of a formal public comment, that FWS misstated and
3 misinterpreted the scientists' findings. (Comment from Carroll, *et al.*, (December 19,
4 2014), AR N057614 at N057615 (hereinafter Carroll Comment).) Among the scientists
5 who joined in the comment were Drs. Carroll, Wayne, and Hedrick, whose publications
6 were cited by FWS in support of the FEIS and the 2015 10(j) rule.⁸ (*See* 2014 FEIS at
7 N042672; 2015 10(j) rule at FR000141.) The scientists asserted FWS misrepresented
8 their conclusions with respect to: (1) the relationship between population size and
9 extinction risk for the experimental population, and (2) the relationship between effective
10 migration rate and the long-term genetic health of the population. (Carroll Comment at
11 N057616–18.) These concerns were largely premised on the fact that the cited
12 publications analyzed effects on a population present within a metapopulation (*i.e.*, three
13 populations connected by dispersal), whereas the FEIS assumed the same outcomes for a
14 single isolated population. (*See id.*) In light of this discrepancy, the scientists opined that
15 FWS's population objective and effective migration rate failed to prevent long-term
16 erosion in the genetic health of the experimental population of Mexican wolves and that
17 the selected course of action would therefore hinder the recovery of the species. As
18 stated in the comment from the scientists:

19 [G]iven the current depauperate genetic composition and the high
20 relatedness of the Blue Range population, in order for this population to
21 contribute to recovery it is necessary to not only forestall further genetic
22 degradation but also reduce the high relatedness of the Blue Range
23 population and increase its levels of genetic variation. The success of this
effort depends on it being initiated while the population is still small, when
each newly released individual has a greater genetic effect on the recipient

24 ⁸ The scientists who authored the comment were Drs. Carlos Carroll, Richard J.
25 Fredrickson, Robert C. Lacy, Robert K. Wayne, and Philip W. Hedrick. (*See* Carroll
26 Comment at N057619.) Some or all of these scientists have been cited in the major
27 agency publications on Mexican wolf recovery since 1998, including the Three- and
28 Five-Year Reviews of the reintroduction program, the 2010 Conservation Assessment,
the 2012 Draft Recovery Plan, the 2014 DEIS and FEIS for the 2015 10(j) rule, the 2015
listing rule, and the 2015 10(j) rule.

1 population. Releases from the captive population at a rate equivalent to 2
2 effective migrants per generation would therefore be inadequate to address
3 current genetic threats to the Blue Range population.

4 (*Id.* at N057618.) The scientists concluded that their “fundamental concern” was that the
5 EIS gave “an overly optimistic depiction of the long term viability of the Blue Range
6 population.” (*Id.*)

7 In spite of the scientists’ concern for the impacts on wolf recovery, on January 16,
8 2015, FWS published the 10(j) rule with the key provisions of Alternative One described
9 above.⁹ (2015 10(j) Rule at FR000136, *et seq.*) The present lawsuit, challenging the 2015
10 rule, was filed that same day.

11 FWS’s Stated Purpose of Rule

12 Like the 1998 10(j) rule before it, the 2015 10(j) rule was not intended to provide
13 full recovery of the species, but to help the agency achieve the “‘first step toward
14 recovery,’ as envisaged by the 1982 Recovery Plan.” (*See* 2014 FEIS at N042669,
15 N042672, N042692.) As defined by FWS, the purpose of the rule is “to improve the
16 *effectiveness* of the reintroduction project to achieve the necessary population growth,
17 distribution, and recruitment, as well as genetic variation within the Mexican wolf
18 experimental population *so that it can contribute to recovery in the future.*” (2015 Rule at
19 FR000148 (emphasis added).) FWS found that by improving the effectiveness of the
20 project, the “potential for recovery of the species” would increase. (*Id.* at FR000136; *see*
21 *also* FR000148.) With this purpose in mind, FWS notes that specific measures not yet
22 implemented by the agency will likely be necessary to recover the species, including
23 objective and measurable criteria for delisting, a scientifically based population goal, and
24 expanded dispersal area based upon the establishment of a metapopulation. (*Id.* at
25 FR000141, FR000148, FR000150, FR000164; 2014 FEIS at N042692.) FWS will review
26 the progress of reintroduction under the new rule in year five, with a focus on

27 ⁹ The rule is published in the Federal Register at 80 Fed. Reg. 2512 and codified at
28 50 C.F.R. § 17.84(k). Concurrently with the Section 10(j) rule, FWS issued a final rule
changing the designation of the Mexican wolf from endangered species to endangered
subspecies. 80 Fed. Reg. 2488 (Jan. 16, 2015).

1 modifications needed to improve the efficacy and the contribution the population is
2 making toward recovery of the Mexican wolf. (2015 10(j) Rule at FR000150.)

3 *Current Status of the Species*

4 In the 2014 FEIS, FWS acknowledged that the experimental population was not
5 thriving. (2014 FEIS at N042674; *see also* 2010 CA at N052341.) As described by FWS,
6 “the experimental population is considered small, genetically impoverished, and
7 significantly below estimates of viability appearing in the scientific literature.” (FEIS at
8 N042674.) In the 2015 10(j) rule, FWS acknowledged that the goal of a viable, self-
9 sustaining population of 100 wolves has never been met. (*See* 2015 10(j) Rule at
10 FR000175.) Although in 2014 the number of wolves in the experimental population
11 jumped to 110, it dropped again in 2015 to 97. (Doc. 135, pp. 3–4.) FWS estimated that
12 between 1998 and 2013, the “initial release success rate” was about 21 percent, which
13 meant that for every 100 wolves released, only 21 of them survived, bred, and produced
14 pups, therefore becoming “effective migrants.” (2015 10(j) Rule at FR000148.) It is
15 undisputed that the growth of the experimental population has been hindered by
16 escalating adult mortalities, illegal takings, and pup mortality. Lawful wolf removals by
17 the agency have also hindered population growth: from 1998 to 2002, 110 wolves were
18 released and 58 were removed; from 2003 to 2007, 68 wolves were released and 84 were
19 removed; from 2008 and 2013, 19 wolves were released and 17 were removed. (*Id.* at
20 FR000140; 2014 FEIS at N042666–67, N042670.) The agency has recognized that
21 permanent removals have the same practical effect on the wolf population as mortality.
22 (2010 CA at N052324.) Moreover, past removals and lethal control measures have led to
23 the loss of genetically valuable animals. (*See* Comment by David Parsons (Dec. 2007),
24 AR N043398, at N043404 (discussing the agency’s killing of AM574, the sixth most
25 genetically valuable wolf, and the removal of wolves from the Aspen pack).) As one
26 employee of FWS stated: “Our management/recovery actions are propping up the
27 subspecies but without that it would tank (extinct within immediate future).” (J006456,
28 Internal FWS edits to Draft Mexican Wolf Listing Rule (Sept. 23, 2012)).

1 FWS has repeatedly recognized that one of the chief threats to the species is loss
2 of genetic diversity. Genetically depressed wolves have lower reproductive success,
3 including smaller litter sizes, low birth weights, and higher rates of pup mortality, as well
4 as lowered disease resistance and other accumulated health problems. (2015 Listing Rule
5 at J016142.) FWS estimates that the captive population retains only three founder
6 genome equivalents—*i.e.*, more than half of the genetic diversity of the seven original
7 founders has been lost from the population. (Mexican Wolf Listing Rule, AR J016124, at
8 J016143 (Jan. 16, 2015) (hereinafter 2015 Listing Rule).) By 2014, the captive population
9 had reached approximately 258 wolves, but 33 of those wolves were reproductively
10 compromised or had very high inbreeding coefficients. The age structure of the captive
11 population was also heavily skewed, such that sixty-two percent of the population was
12 composed of wolves that would die within a few years. This, combined with the release
13 of captive wolves into the wild, means that the overall genetic diversity of the captive
14 population will decline in coming years. (*Id.*)

15 The state of the captive population, in turn, affects the level of genetic fitness
16 achieved by the experimental population. (2015 Listing Rule at J016143 (“The gene
17 diversity of the experimental population can only be as good as the diversity of the
18 captive population from which it is established.”)). In 2014, the experimental population
19 had 33 percent less genetic representation than the captive population. (2014 FEIS at
20 N042673.) Members of the reintroduced population were, on average, as related to each
21 other as full siblings. (*Id.*) As described by Dr. Fredrickson, “the reintroduced population
22 is a genetic basket case in need of serious genetic rehab. Failing to do so is irresponsible
23 and also managing for extinction.” (Email to FWS (Nov. 24, 2013), AR J017818.)

24 Future Recovery Requirements

25 In its 2014 FEIS, FWS discussed the relationship between population size,
26 distribution, and genetic fitness, and the impacts these factors have on species viability.
27 (See 2014 FEIS at N042669–75.) According to the agency, “[a] species with a small
28 population, narrowly distributed, is less likely to persist (in other words it has a higher

1 risk of extinction) than a species that is widely and abundantly distributed.” (*Id.* at
2 N042671.) The combination of a small number of animals with low genetic variation is
3 particularly harmful, as it can lead to an “extinction vortex,” a self-amplifying cycle
4 which results in decreased fitness and lower survival rates. (*Id.*) According to FWS,
5 “[t]he Mexican wolf, in particular, is more susceptible to population decline than other
6 gray wolf populations because of smaller litter sizes, less genetic variation, lack of
7 immigration from other populations, and potential low pup recruitment.” (*Id.* (citations
8 omitted).)

9 Scientists have concluded that establishing a metapopulation is necessary to
10 achieve the recovery of the species. In their 2014 publication, Drs. Carroll, Fredrickson
11 and Lacy found that the “viability of the existing wild population is uncertain unless
12 additional population can be created and linked by dispersal of >0.5
13 migrants/generation.” (Carroll, *et al.*, Developing Metapopulation Connectivity Criteria
14 from Genetic and Habitat Data to Recover the Endangered Mexican Wolf (2014), AR
15 N004225, at N004233.) Likewise, in its 2012 draft recovery plan, the Mexican wolf
16 recovery team determined that establishment of a metapopulation was one of five criteria
17 necessary to accomplish the delisting of the subspecies. (2012 Draft RP at C043106–07.)
18 Although FWS stated in the 2014 FEIS it lacks “sound, peer-reviewed, scientific basis”
19 to determine what is needed for full recovery (2014 FEIS at N042692), FWS has also
20 recognized that the future success of the Mexican wolf “is likely to depend on the
21 establishment of a metapopulation or several semi-disjunct populations spanning a
22 significant portion of its historic range in the region.” (2015 10(j) Rule at FR000175.)
23 FWS asserts that this must be accomplished through the development of a revised
24 recovery plan, which may, in turn, require further revision to the experimental population
25 regulations and any necessary analysis pursuant to NEPA. (2015 10(j) Rule at FR000141,
26 FR000148.)

27 November 2017 Draft Revised Recovery Plan & Related Litigation

28 On November 30, 2017, in response to litigation by environmental groups and the

1 State of Arizona, FWS completed a revised recovery plan for the Mexican gray wolf.¹⁰
2 FWS received 101,010 public comments on the draft plan. (Doc. 57, p. 2 in case No. CV-
3 14-02472-TUC-JGZ.) The 2017 draft recovery plan, which provides criteria for the
4 delisting of the species, anticipates two inter-connected populations of Mexican wolves in
5 the United States and Mexico. (2017 RP at 10, 18–20.) In the United States,
6 implementation of the new plan will involve a single population in Arizona and New
7 Mexico, south of I-40. (*Id.* at 11.) FWS anticipates that under the new plan the Mexican
8 wolf will be recovered in 25-35 years. (*Id.* at ES-3.) The Center for Biological Diversity
9 *et al.* filed a separate action challenging the 2017 revised recovery plan on January 30,
10 2018, alleging that the plan fails to provide for the recovery of the Mexican wolf. (*See*
11 doc. 1, in case No. CV-18-00047-TUC-JGZ.)

12 DISCUSSION

13 For the reasons discussed below, the Court finds that the 2015 10(j) rule fails to
14 further the conservation of the Mexican wolf. The Court further finds that the essentiality
15 determination is arbitrary and capricious. Because these two requirements of Section
16 10(j) have not been met, the Court will remand to the agency for further proceedings
17 consistent with this Order.

18 **I. The 2015 Section 10(j) rule fails to further the recovery of the Mexican wolf.**

19 Before authorizing the release of an experimental population under ESA Section
20 10(j), the Secretary must, by regulation, determine that such release will “further the
21 conservation of [the] species.” 16 U.S.C. § 1539(j)(2)(A); *see also* 50 C.F.R. § 17.81(b).
22 Plaintiffs CBD, WEG, the Coalition, and SCI each ask the Court to invalidate all or part
23 of the 2015 10(j) rule on the ground that the rule fails to further the recovery of the
24

25
26 ¹⁰ *See* doc. 55 in case No. CV-14-02472-TUC-JGZ; doc. 49 in case No. CV-15-
27 00245-TUC-JGZ. The Court takes judicial notice of the first revision to the 2017
28 Mexican Wolf Recovery Plan, which is a publicly available document. *See*
<https://www.fws.gov/southwest/es/mexicanwolf/pdf/2017MexicanWolfRecoveryPlanRevision1Final.pdf> (last visited March 27, 2018); 82 Fed. Reg. 29,918. The information from the 2017 plan is discussed herein as background only.

1 species.^{11,12} Alternatively, Federal Defendants and Defendant-Intervenor Arizona
2 (collectively “Defendants” for the purposes of this section) ask this Court to uphold the
3 2015 10(j) rule on the ground that it complies with the ESA’s requirement to further the
4 recovery of the species. Having considered the parties’ arguments, the Court concludes
5 that the 2015 rule only provides for the survival of the species in the short term and
6 therefore does not further recovery for the purposes of Section 10(j). The Court also
7 agrees with CBD and WEG that, by failing to provide for the population’s genetic health,
8 FWS has actively imperiled the long-term viability of the species in the wild.

9 A. The 2015 10(j) rule provides only for short-term survival of the species and
10 fails to further the long-term recovery of the Mexican wolf in the wild.

11 FWS implemented the 2015 10(j) rule as an interim measure that would improve
12 the effectiveness of the reintroduction program, until such time as further recovery
13 actions may be accomplished. Although the rule contemplates an increase in certain
14 metrics, such as population size and geographic range, it does not, in and of itself, further
15 the recovery of the species. Rather, the rule only ensures the short-term survival of the

16
17 ¹¹ The question of whether the 2015 10(j) rule furthers recovery of the species is
18 raised in each of the four cases, and the Court’s resolution of this issue thus affects each
19 of the 12 pending motions for summary judgment. Although CBD, WEG, the Coalition,
20 and SCI each argue that the rule fails to further recovery of the species, their arguments
21 as to *why* often vary so greatly that the Court may agree with the proposition set forth by
22 a party, but nevertheless reject that party’s reasoning. In an effort to fully address the
23 parties’ claims and to give guidance to the agency on remand, the Court addresses all of
24 the arguments related to furthering recovery together in this section. In sum, the Court
25 finds the reasoning of CBD and WEG persuasive on this issue, and rejects the reasoning
26 of the Coalition and SCI.

27 ¹² In a related argument, SCI contends that the Secretary violated Section 4(d) of
28 the ESA, 16 U.S.C. § 1533(d), by (1) failing to issue experimental population regulations
necessary and advisable for the conservation of the species, and (2) failing to include
SCI’s requested escape clause. (Doc. 69 in case No. CV-16-00094-TUC-JGZ, pp. 31–33,
35–38.) The Ninth Circuit has rejected the argument that a Section 10(j) regulation must
meet the requirements of ESA Section 4(d). *United States v. McKittrick*, 142 F.3d 1170,
1176 (9th Cir. 1998). Accordingly, the Court will deny summary judgment on SCI’s
claims raised under ESA Section 4(d).

1 species.

2 The rule's provision for a single, isolated population of 300-325 wolves, with one
3 to two effective migrants per generation, does not further the conservation of the species
4 and is arbitrary and capricious. When FWS approved the population size and effective
5 migration rate, it misinterpreted the findings of Carroll et al. (2014) and Wayne &
6 Hedrick (2010), which it had relied upon to support its population objective. Specifically,
7 the population size and effective migration rate that was selected for the final rule fails to
8 account for the fact that the Blue Range population is not connected to a metapopulation
9 and suffers from a higher degree of interrelatedness than is assumed in those studies.
10 When these circumstances are factored in, Drs. Carroll, Wayne and Hedrick, among
11 others, conclude that the effective migration rate and population size in the 2015 rule are
12 insufficient to ensure the long-term viability of the species. In their public comment to
13 FWS, Drs. Carroll et al. state that "[r]eleases from the captive population at a rate
14 equivalent to 2 effective migrants per generation would . . . be inadequate to address
15 current genetic threats to the Blue Range population." They further note that forestalling
16 genetic degradation and reducing the high relatedness of the population are actions that
17 must be taken early on, while the population is still small, "*in order for this population to*
18 *contribute to recovery.*" (Carroll Comment at N057618.) To the extent that FWS now
19 seeks to argue in this litigation that the population size and effective migration rate
20 further the recovery of the species, the Court finds that that position is not entitled to
21 deference. *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 969 (9th Cir. 2002)
22 ("While we give deference to an administrative agency's judgment on matters within its
23 expertise, here the Forest Service's own scientists have concluded that the 'Forest Plan
24 approach to sustaining old growth through the planning period is invalid' . . .").

25 Indeed, FWS itself acknowledges in the 2015 rule that "a small isolated Mexican
26 wolf population, such as the existing experimental population, can neither be considered
27 viable nor self-sustaining." (2015 10(j) Rule at FR000138-39A). FWS nevertheless
28 justified the population objective on the grounds that it "would provide for the

1 persistence of the population and enable it to contribute to the next phase of working
2 toward full recovery of the Mexican wolf” (*Id.*) “Persistence” is antithetical to the
3 ESA’s recovery mandate. *Gifford Pinchot Task Force v. United States Fish and Wildlife*
4 *Serv.*, 378 F.3d 1059, 1070, (“[T]he ESA was enacted not merely to forestall the
5 extinction of species (i.e., promote a species survival), *amended*, 387 F.3d 968 (9th Cir.
6 2004), but to allow a species to recover to the point where it may be delisted.”); *Sierra*
7 *Club v. United States Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001) (“[T]he
8 objective of the ESA is to enable listed species not merely to survive, but to recover from
9 their endangered or threatened status.”). Ensuring the short-term survival of the species
10 falls short of Section 10(j)’s requirement that the release of an experimental population
11 further the recovery of the species. 16 U.S.C. § 1539(j)(2)(A). In sum, in approving the
12 population size and effective migration rate, FWS first failed to articulate a rational
13 connection between the facts in the record and the choice made, *Forest Guardians*, 329
14 F.3d at 1099, and second justified its deficiency on the “short-term” nature of the rule,
15 which is legally insufficient under the ESA. *See Judulang*, 565 U.S. at 53, 55 (agency
16 decision must be based on relevant factors that are tied to the purpose of the underlying
17 statute).¹³ Accordingly, the Court concludes that the population size and effective
18 migration rate, which do not further the conservation of the species, are arbitrary and
19

20 ¹³ The remaining provisions of the 2015 rule fail to remedy this deficiency and, in
21 some instances, threaten to compound the problem. In spite of the fact that the rule does
22 not provide a minimum population size and effective migration rate to protect against
23 genetic deterioration, FWS imposed a population cap that creates the potential for
24 removal or killing of genetically valuable wolves. The rule permits the agency to use “all
25 available management options” so as not to exceed the cap. Although the rule expresses
26 the agency’s “preference for translocation,” it permits the agency to use “all available
27 management options” so as not to exceed the cap. (*See* Comment by David Parsons
28 (Dec. 2007), AR N043398, at N043404 (discussing the agency’s killing of AM574, the
sixth most genetically valuable wolf, and the removal of wolves from the Aspen pack).
Similarly, although FWS acknowledges that territory north of I-40 will likely be required
for future recovery and recognized the importance of natural dispersal and expanding the
species’ range, it nevertheless imposed a hard limit on dispersal north of I-40. Any
wolves that venture outside the MWEPA will be captured and returned. The agency again
relied on the limited scope of the rule to justify this provision, stating that the purpose of
the rule is to improve the effectiveness of the reintroduction project and citing to the
recovery plan as the likely means of addressing the insufficient geographic range that is
provided by the present rule.

1 capricious.

2 In addition, the expanded take provisions contained in the new rule do not contain
3 adequate protection for the loss of genetically valuable wolves. The agency's authority to
4 manage a 10(j) population includes the option to authorize lethal and nonlethal take. This
5 authority stems not from biological considerations, but from the agency's need to
6 coordinate the recovery effort with affected stakeholders. However, in issuing take
7 permits, "the Secretary is subject to the requirement of Section 10(d) that issuance will
8 not operate to the disadvantage of the listed species," S. Rep. No. 97-418 at 8, and the
9 permit issued must be consistent with the ESA's conservation purpose and policy, 16
10 U.S.C. § 1539(d). FWS has repeatedly recognized that one of the chief threats to the
11 species is loss of genetic diversity, *see* discussion, *supra* p. 21, yet the expanded take
12 provisions lack protections for loss of genetic diversity. Instead, FWS justifies the
13 expanded take provisions on the ground that they will "make reintroduction compatible
14 with current and planned human activities, such as livestock grazing and hunting." This
15 explanation fails to show that FWS considered the requirements of Section 10(d), or that
16 its decision adhered to the ESA's conservation purpose.

17 Defendants concede that the 2015 rule is not sufficient in the long term, and offer
18 a series of justifications for the rule's short-term focus, each of which the Court rejects.
19 First, Defendants urge the Court to find that the rule is sufficient in light of the recovery
20 plan, which, at the time of briefing, was forthcoming, but has since been issued and
21 subject to legal challenge. The Court concludes that the substance or terms of future
22 recovery actions, do not relieve FWS of its obligations under Section 10(j). Moreover,
23 the provisions of a recovery plan are discretionary, not mandatory. Thus, even if the
24 recovery plan contained all terms promised by Defendants here, there is no guarantee that
25 those terms will protect against the harms that the Court finds presented by 10(j) rule.¹⁴

26
27 ¹⁴ The Court rejects the Coalition's argument that the 2015 10(j) rule fails to
28 further recovery because it does not conform to the terms of the existing recovery plan or
that the rule is necessarily deficient because it was finalized in advance of the
forthcoming revised recovery plan. (Doc. 109, pp. 14–17, 22–23.) Recovery plans do not

1 Defendants next contend that the rule is sufficient as an interim measure, under the
2 agency's stepwise approach to recovery, and that any deficiencies in the rule will not
3 result in harm the Mexican wolf in the foreseeable future. This argument completely
4 misconstrues the principles guiding recovery, which focus on long-term viability of the
5 species, and again requires that the Court rely on the promise of future action that may
6 never be implemented. The Court declines to do so. The experimental population that is
7 the subject of this litigation is the only population of Mexican wolves in the wild. *See*
8 *Motor Vehicle Mfrs. Ass'n of United States, Inc.*, 463 U.S. at 43. It is undisputed that
9 recovery of the population is in genetic decline and that the present agency action will
10 have long-term effects on the genetic health of the species.

11 Nor does the significant "management flexibility" afforded to the agency under
12 Section 10(j) justify the failure to further the long-term recovery of the Mexican gray
13 wolf. Section 10(j) was added to the ESA by amendment in 1982 as a means of providing
14 FWS with administrative and management flexibility to transplant an endangered species
15 into previously uninhabited habitat. *See* 49 Fed. Reg. 33,885, 33,886, 33,889 (Aug. 27,
16 1984). Indeed, as the Ninth Circuit has noted, "Congress's specific purpose in enacting
17 section 10(j) was to 'give greater flexibility to the Secretary.'" *United States v.*
18 *McKittrick*, 142 F.3d 1170, 1174 (9th Cir. 1998) (quoting H.R. Rep. No. 97-567, at 33
19 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2833.). However, there is no indication
20

21 govern all aspects of recovery under the ESA, but rather are non-binding statements of
22 intention with regards to the agency's long-term goal of conservation. *See Friends of*
23 *Blackwater v. Salazar*, 691 F.3d 428, 434 (D.C. Cir. 2012) (a recovery plan is a non-
24 binding, "statement of intention," and not a contract); *Conservation Cong. v. Finley*, 774
25 F.3d 611, 620 (9th Cir. 2014) (declining to adopt particular recommendations in a
26 recovery plan, which is nonbinding on an agency, does not constitute failing to consider
27 them). The agency may move forward with conservation goals under other sections of the
28 ESA, even in the absence of an updated recovery plan. *Arizona Cattle Growers' Ass'n v.*
Kemphthorne, 534 F. Supp. 2d 1013, 1025 (D. Ariz. 2008), *aff'd sub nom. Arizona Cattle*
Growers' Ass'n v. Salazar, 606 F.3d 1160 (9th Cir. 2010) (rejecting the argument that the
agency cannot move forward with a conservation effort without first identifying in a
recovery plan the precise point at which conservation will be achieved).

1 that the management flexibility afforded to the agency under Section 10(j) was intended
2 to displace the ESA's broader conservation purpose, or that it overrides the duty to use
3 the best available science. On the contrary, it is clear from the legislative history that the
4 management flexibility afforded under Section 10(j) "*allows the Secretary to better*
5 *conserve and recover endangered species.*" *McKittrick*, 142 F.3d at 1174 (emphasis
6 added). The Court is not unsympathetic to the challenges the agency faces in its efforts to
7 recover such a socially controversial species. As FWS observed in 1982, any recovery
8 effort must deal with the residue of a long history of anti-wolf sentiment by the public.
9 (1982 RP at R000895.) However, any effort to make the recovery effort more effective
10 must be accomplished without undermining the scientific integrity of the agency's
11 findings and without subverting the statutory mandate to further recovery. The agency
12 failed to do so here.

13 In reaching its conclusions, the Court is mindful that when reviewing scientific
14 findings within the agency's area of expertise, it is at its most deferential. *The Lands*
15 *Council*, 559 F.3d at 1052; *accord Baltimore Gas and Elec. Co. v. Natural Res. Def.*
16 *Council, Inc.*, 462 U.S. 87, 103 (1983). However, this is not a case in which the agency
17 was required to choose between conflicting scientific evidence. On the contrary, the best
18 available science consistently shows that recovery requires consideration of long-term
19 impacts, particularly the subspecies' genetic health. Moreover, this case is unique in that
20 the same scientists that are cited by the agency publicly communicated their concern that
21 the agency misapplied and misinterpreted findings in such a manner that the recovery of
22 the species is compromised.¹⁵ To ignore this dire warning was an egregious oversight by
23 the agency. *Idaho Sporting Cong., Inc.*, 305 F.3d at 969 (declining to defer to the

24 ¹⁵ The Court rejects the Coalition's argument that FWS did not have the scientific
25 data necessary to make an informed decision about recovery. (*See doc. 153, p. 12.*) The
26 Coalition's principal challenge is that Dr. Carroll's 2014 study utilized data collected
27 from North American gray wolves, rather than Mexican gray wolves. The Coalition fails
28 to explain why this renders the data invalid or present better existing data. *See* 50 C.F.R.
§ 17.81(b) (Secretary shall utilize the "best scientific and commercial data *available*" in
considering effects on recovery) (emphasis added).

1 agency's judgment on matters within agency expertise where the Forest Service's own
2 scientists concluded a forest plan standard was invalid).

3 In sum, FWS failed to consider recovery, in accordance with 50 C.F.R. § 17.81(b),
4 or to further the conservation of the species under Section 10(j), 16 U.S.C. §
5 1539(j)(2)(A). The rule as a whole fails to further recovery: FWS did not create a
6 population in the 2015 rule that would be protected against the loss of genetic diversity,
7 and there are no other viable populations to cushion the subspecies from the long-term
8 harm that is predicted to result under the 2015 rule. Accordingly, the Court concludes that
9 the 2015 10(j) rule is arbitrary and capricious, and will grant summary judgment in favor
10 of CBD and WEG on this ground in cases Nos. CV-15-00019-TUC-JGZ and No. CV-15-
11 00285-TUC-JGZ.

12 B. The revised rule does not need to be the product of an agreement with state
13 and private stakeholders.

14 The Court rejects SCI's argument that the 2015 10(j) rule is invalid because it was
15 adamantly opposed by state and private stakeholders. (*See* doc. 69 in case No. CV-16-
16 00094-TUC-JGZ, pp. 18–31, 33 – 35.) Section 10(j) of the ESA does not require that the
17 10(j) rule be the product of an agreement with state and private stakeholders. *See* 16
18 U.S.C. § 1539(j). The Court disagrees with SCI's assertion that Congress intended such a
19 requirement and concludes SCI has failed to demonstrate any “clearly contrary
20 congressional intent” in the legislative history to the 1982 ESA amendments. *See Carson*
21 *Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 884 (9th Cir. 2001) (where statute's
22 plain meaning is clear, a review of the legislative history is strictly limited to ensure no
23 clearly contrary congressional intent). On the contrary, the legislative history
24 demonstrates that, although Congress anticipated Section 10(j) regulations would be
25 implemented in consultation with affected parties, the Secretary would retain the
26 authority and management flexibility to issue regulations that further the conservation of
27 the species. *See* H.R. Rep. 97-567, 97th Cong., 2d Sess. § 5 (May 17, 1982); *see also*
28 *Wyo. Farm Bureau Fed'n v. Babbitt*, 987 F. Supp. 1349, 1366 (D. Wyo. 1997), *rev'd on*

1 *other grounds*, 199 F.3d 1224 (10th Cir. 2000).

2 The Court similarly rejects SCI's argument that FWS violated 50 C.F.R.
3 § 17.81(d)'s requirement that regulations represent, "to the maximum extent practicable,"
4 a cooperative agreement between state and federal agencies and private landowners.
5 Although FWS revised the 1998 10(j) rule to increase the number of wolves permitted in
6 the MWEPA against the wishes of New Mexico's hunting community and New Mexico
7 state wildlife management authorities (doc. 69 in case No. CV-16-00094-TUC-JGZ, pp.
8 29–30), the Court cannot conclude that FWS violated 50 C.F.R. § 17.81(d) when it
9 declined to adopt the position of certain stakeholders. The record in this case reveals that
10 prior to finalizing the FEIS and Section 10(j) rule, FWS consulted and coordinated with
11 many parties, including New Mexico wildlife management agencies and private
12 stakeholders. FWS held formal and informal meetings with New Mexico's wildlife
13 management authorities, maintained stakeholder mailing lists, and worked with state
14 agencies to collect and analyze data on biological and economic factors. (*See* FEIS at
15 N042931–41; 2015 10(j) Rule at FR000176.) FWS also invited 84 state, tribal, and
16 federal government entities to participate as cooperating parties pursuant to memoranda
17 of understanding. (*See* 2015 10(j) Rule at FR000158.) SCI's contention that these efforts
18 do not constitute an agreement "to the maximum extent practicable" is unpersuasive. The
19 Court cannot find that FWS abdicated its duty when it declined to adopt a position of a
20 select few parties that would be tantamount to a veto on the agency action, as this would
21 effectively prevent the agency from carrying out its statutory mandate in the absence of
22 complete consent. Accordingly, the Court will deny summary judgment to SCI on this
23 ground.

24 C. The rule provides sufficient suitable habitat for the species.

25 The Court rejects the Coalition's argument that in the 2015 10(j) rule, FWS failed
26 to provide sufficient suitable habitat for the Mexican wolf. Under agency regulations, an
27 experimental population shall be "*released* into suitable natural habitat...." 50 C.F.R.
28 § 17.81(a) (emphasis added). FWS asserts in its 2014 FEIS it "will not release or

1 translocate Mexican wolves into areas that do not have suitable habitat.” (2014 FEIS at
2 N043074.) In its 2015 rulemaking the agency repeatedly notes that it expects wolves to
3 occupy areas of suitable habitat, and that portions of the MWEPA considered unsuitable
4 for permanent occupancy are necessary to permit wolves to roam and travel to new
5 territories.¹⁶ (2014 FEIS at N042677–78.) Neither the ESA, nor 50 C.F.R. § 17.81(a),
6 requires FWS to limit the total geographic range of an experimental population to
7 suitable habitat. Moreover, the Coalition has not provided any authority that would
8 restrict the agency’s use of unsuitable habitat for purposes other than release.
9 Accordingly, the Court will deny the Coalition’s motion for summary judgment on these
10 grounds.¹⁷

11 **II. FWS’s essentiality determination was arbitrary and capricious.**

12 In 1998, when FWS first designated the experimental population of Mexican
13 wolves, the agency determined in accordance with ESA Section 10(j)(2)(B) that the
14 population was not essential to the continued existence of the species. In 2015, the
15 population’s “nonessential” designation was carried over to the revised rulemaking: FWS
16 declared that nothing in the 2015 rule changed the designation and the agency was not
17 “revisiting” the 1998 determination. (2015 10(j) Rule at FR000174.) FWS explained that
18 because the purpose of the 2015 rule was to revise management protocols for an existing
19 population, reconsideration of the population’s nonessential status was “outside the
20 scope” of the rulemaking. (*Id.* at FR000163.)

21 In its present Motion for Summary Judgment, WEG argues that FWS’s decision to

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23 ¹⁶ Moreover, restricting the agency’s use of unsuitable habitat would go against
24 Congress’s intent to further the conservation of threatened and endangered species and to
25 minimize potential conflicts with local landowners. *See Wyoming Farm Bureau*
26 *Federation v. Babbitt*, 199 F.3d 1224, 1231 (10th Cir. 2000) (“Congress added section
10(j) to the Endangered Species Act in 1982 to address the Fish and Wildlife Service’s
and other affected agencies’ frustration over political opposition to reintroduction efforts
perceived to conflict with human activity.”).

27 ¹⁷ The Coalition’s argument that the agency failed to meet its “stated requirements
28 for suitable habitat as an area with ‘limited or no livestock grazing’ and ‘minimal human
use’” is similarly unpersuasive. Although livestock grazing and human use are discussed
in the 2014 FEIS in the context of “suitable habitat,” FWS does not explicitly state that
the criteria for suitable habitat are limited to these factors.

1 maintain the experimental population's nonessential status was arbitrary and capricious.¹⁸
2 (Doc. 112, pp. 12–26.) WEG contends that the change in listing status of the Mexican
3 wolf, from endangered species to endangered subspecies, triggered a duty to perform a
4 new essentiality determination, and that the agency's reliance on the outdated 1998
5 determination failed to use the best available science. (*Id.*) Federal Defendants and
6 Defendant-Intervenor Arizona (collectively "Defendants," for the purposes of this
7 section) argue that there is no obligation under the ESA or agency regulations to perform
8 a new essentiality determination when the agency voluntarily revises an existing 10(j)
9 rule, as FWS did in 2015. (Doc. 134, pp. 19–25; doc. 142, pp. 9–12.) According to
10 Defendants, the experimental population of Mexican wolves was released in 1998, and
11 the essentiality determination performed at that time is in full satisfaction of the
12 Secretary's duty under Section 10(j). (*Id.*)

13 The Court concludes that because the effect of the 2015 rulemaking was to
14 authorize the release of an experimental population outside its current range, a new
15 essentiality determination was required and the agency's decision to maintain the
16 population's nonessential status without consideration of the best available information
17 was arbitrary and capricious.

18 A. FWS is required to perform a new essentiality determination when it
19 authorizes the release of an experimental population outside the species'
20 current range.

21 Section 10(j)(2) of the ESA requires the Secretary to perform an essentiality
22 determination prior to authorizing the release of any population of an endangered species
23 *outside the current range of such species.* See 16 U.S.C. § 1539(j)(2)(A), (B). In 1998,
24 there was no existing range for the Mexican wolf; the subspecies had been completely
25 extirpated from the wild. At that time, FWS authorized a release of wolves into the
26 BRWRA, a 6,854 square-mile area. The 2015 rule provides for the release of Mexican

27 ¹⁸ Plaintiff WEG is the only party to challenge the 2015 essentiality determination,
28 and accordingly the resolution of the present issue affects only the motion and cross-
motions for summary judgment filed in case No. CV-15-00285-TUC-JGZ.

1 wolves outside the BRWRA—the species’ only existing current range. Specifically, the
2 rule expressly authorizes the release of wolves into two of the three zones of the
3 expanded MWEPA and during all three phases of the 12-year reintroduction period.
4 (2015 10(j) Rule at FR000144.) In fact, in the 2015 rule, FWS acknowledges that the
5 “designated experimental population area for Mexican wolves classified as a nonessential
6 experimental population by this rule . . . *is wholly separate geographically from the*
7 *current range of any known Mexican wolves.*” (*Id.* at FR000183 (emphasis added).)
8 Because the 2015 rule authorizes releases outside of the current range of the species, the
9 Court finds that an essentiality determination was required under the plain language of
10 Section 10(j). *See* 16 U.S.C. § 1539(j)(2)(A), (B).

11 Defendants nevertheless claim that an essentiality determination is not required
12 because the 2015 rule was a “revision” to an existing rule and neither the statute nor the
13 regulations require a new essentiality determination for a revision. Defendants urge the
14 Court to accept that the statute and regulations are therefore ambiguous and that the
15 agency’s interpretation that a revision is not required is entitled to deference under
16 *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984), and *Auer v. Robbins*, 519 U.S.
17 452 (1997).

18 The Court is not persuaded that deference is warranted here. First, the Court
19 rejects Defendants’ argument that the statute is ambiguous as to when an essentiality
20 determination is required. As discussed above, the ESA is clear that an essentiality
21 determination is required prior to authorizing the release of any population of an
22 endangered species outside the current range of such species. 16 U.S.C. § 1539(j)(2)(A),
23 (B). To the extent FWS argues that an essentiality determination is not required for a
24 revised rulemaking, that interpretation conflicts with the plain language of the statute.
25 Under Defendants’ interpretation, the Court would be required to find that an essentiality
26 determination is not required, even where all of the conditions set forth in the statute are
27 met, simply because the rule is denominated a revision by the agency. The Court declines
28 to read the statute in a manner that negates the plain language of the statute. *Chevron*, 467

1 U.S. at 844 (agency’s interpretation is permissible unless “arbitrary, capricious, or
2 manifestly contrary to the statute.”); *see also Marsh v. J. Alexander’s LLC*, 869 F.3d
3 1108, 1116–17 (9th Cir. 2017) (“[A] court need not accept an agency’s interpretation of
4 its own regulations if that interpretation is inconsistent with the statute under which the
5 regulations were promulgated.” (internal changes, quotation marks and citations
6 omitted)).¹⁹

7 Second, the agency’s proposed interpretation would negate Congress’s intent that
8 the essentiality determination be made by regulation. 16 U.S.C. § 1539(j)(2)(B) (“Before
9 authorizing the release of any population under subparagraph (A), the Secretary shall by
10 regulation identify the population and determine, on the basis of the best available
11 information, whether or not such population is essential to the continued existence of an
12 endangered species or a threatened species.”). The regulation requirement ensures the
13 benefit of public comment. H.R. Conf. Rep. 97-835, reprinted in 1982 U.S.C.C.A.N.
14 2860, 2875; *accord Wyo. Farm Bureau Fed’n*, 199 F.3d at 1232-33 (citing same); *see*
15 *also* 49 Fed. Reg. at 33,886 (“Regulations for the establishment or designation of
16 individual experimental populations will be issued in compliance with the informal
17 rulemaking provisions of the [APA], in order to secure the benefit of public
18 comment....”). The importance of proceeding by regulation is apparent here. The
19 Mexican wolf’s range is greatly expanded under the new rule, from 6,854 square miles to
20 153,871 square miles, without the opportunity for public comment on the decision to
21 retain the population’s nonessential status.

22 In sum, the Court concludes that FWS was required to perform a new essentiality
23 determination when it issued the 2015 10(j) rule, which authorized the release of an

24
25 ¹⁹ Defendants rely on Section 10(j)’s implementing regulations, found at 50 C.F.R.
26 § 17.81. These regulations require an essentiality determination whenever the Secretary
27 designates an experimental population that has been or will be released into suitable
28 natural habitat *outside the species’ current natural range*. 50 C.F.R. § 17.81(a), (c)(2)
(emphasis added). The Court does not find any conflict between Section 10(j)(2) and 50
C.F.R. § 17.81. The ESA’s implementing regulations effectively restate the requirements
of Section 10(j). *See Gonzales v. Oregon*, 546 U.S. 243, 915–16 (2006) (“the near
equivalence of the statute and regulation belies the Government’s argument
for *Auer* deference”).

1 experimental population outside the species' current range. The agency's suggestion that
2 an essentiality determination is not required for revisions is not a plausible construction
3 of Section 10(j) and conflicts with Congress's express intent that the agency perform an
4 essentiality determination anytime it authorizes the release of a species outside of its
5 current range and that the agency proceed by regulation. *See Resident Councils of Wash.*
6 *v. Leavitt*, 500 F.3d 1025, 1034 (9th Cir. 2007) (The *Chevron* test "is satisfied if the
7 agency's interpretation reflects a plausible construction of the statute's plain language
8 and does not otherwise conflict with Congress' expressed intent.") (internal quotation
9 marks and citations omitted). FWS's failure to perform this requirement under the ESA
10 prior to authorizing the release of the population under the 2015 10(j) rule was arbitrary
11 and capricious.²⁰

12 B. Alternatively, FWS's decision to maintain the experimental population's
13 1998 nonessential designation is not based upon the best available
14 information and is arbitrary and capricious.

15 Under Section 10(j), the Secretary's determination of whether a population is
16 essential to the continued existence of the species in the wild must be made "on the basis
17 of the best available information." 16 U.S.C. § 1539(j)(2)(B). Agency regulations
18 similarly require that the essentiality finding be "based solely on the best scientific and
19

20 ²⁰ Defendants also argue that FWS's decision not to revisit the 1998 essentiality
21 determination is not a final agency action that is reviewable under APA Section
22 706(2)(A), and is more properly characterized as a "failure to act" under APA Section
23 706(1). *See* 5 U.S.C. § 706(1) (reviewing court shall compel agency action unlawfully
24 withheld or unreasonably delayed). Although FWS did not perform a new analysis, the
25 decision to maintain the 1998 designation nevertheless constitutes a final agency action.
26 *See Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). First, the decision was included in a
27 final rulemaking that marked the consummation of the agency's decision-making
28 process. *See ONRC Action v. Bureau of Land Mgm't*, 150 F.3d 1132, 1136 (9th Cir.
2003). Second, the agency's decision to retain the nonessential status implicated the level
of interagency cooperation required under Section 7, 16 U.S.C. § 1536 (requiring federal
agencies to confer or consult with FWS on federal actions likely to jeopardize the
continued existence of the species, depending on essential or nonessential status).
Similarly, the nonessential designation relieved FWS of the duty to designate critical
habitat under Section 10(j)(2)(C)(ii). *See* 16 U.S.C. § 1539(j) (2)(C)(ii).

1 commercial data available, and the supporting factual basis[.]” 50 C.F.R. § 17.81(c)(2).
2 The Secretary must consider whether the loss of the experimental population “would be
3 likely to appreciably reduce the likelihood of the survival of the species in the wild.” *See*
4 50 C.F.R. §§ 17.80(b), 17.81(c)(2). This is a fundamentally biological inquiry and
5 requires the agency to consider existing circumstances and science. FWS failed to do so
6 here.

7 FWS made no findings regarding the current state of the Mexican wolf
8 experimental population. Rather, it relied on findings it made in 1998, when
9 circumstances were markedly different than they are today. In 1998, the Mexican wolf
10 was part of the listing the North American gray wolf as an endangered species. Under the
11 1998 rule, the population would occupy the BRWRA, a 6,854 square-mile area. FWS
12 authorized 11 wolves for the initial release, and set a goal of a self-sustaining population
13 of 100 wolves in the wild. There were approximately 150 wolves in captivity to support
14 this reintroduction effort.

15 In contrast, the 2015 rule pertains to the Mexican wolf as its own newly
16 designated subspecies. The 2015 rule authorizes the release, translocation and dispersal
17 of wolves throughout a greatly expanded MWEPA, which encompasses all of Arizona
18 and New Mexico south of I-40 and totals 153,871 square miles. Although initial releases
19 will only occur in Zones 1 and 2, wolves will be permitted to disperse naturally into all of
20 the expanded MWEPA. Moreover, although in the 17 years since the wolf was first
21 introduced the captive population has grown to approximately 250 wolves, that
22 population is aging and has lost much of its genetic diversity. Finally, the Court notes that
23 the body of scientific knowledge surrounding the Mexican wolf species has grown
24 significantly since 1998, as is demonstrated by many of the recent studies cited by FWS
25 in other portions of the 2015 rule.

26 In sum, in deciding to maintain the 1998 essentiality determination, FWS failed to
27 account for or consider the present circumstances of the experimental population.
28 Although it is for the agency to interpret and weigh the facts, adopting a decision made

1 17 years prior without explanation does not satisfy the agency’s duty to base its decision
2 on the best available science and information or to articulate a rational connection
3 between the facts found and the conclusion reached. Accordingly the Court finds that the
4 agency’s decision to maintain the Mexican wolf’s nonessential status in the 2015
5 rulemaking was arbitrary and capricious. *See Forest Guardians*, 329 F.3d at 1099
6 (agency must articulate a rational connection between the facts found and the choice
7 made); *Judulang v. Holder*, 565 U.S. at 53, 55 (reasons for agency decisions must be
8 based on non-arbitrary, relevant factors that are tied to the purpose of the underlying
9 statute). The Court will grant summary judgment in favor of WEG in case No. CV-15-
10 00285-TUC-JGZ on this ground.

11 REMEDY

12 Having found that the 2015 10(j) rule is not compliant with the ESA, the Court
13 must determine the proper remedy. Plaintiffs CBD and WEG ask the Court to sever and
14 vacate only the challenged portions of the Section 10(j) rule.²¹ Federal Defendants and
15 the State of Arizona request that the Court remand the rule without *vacatur* for agency
16 reconsideration.

17 Although not without exception, *vacatur* of an unlawful agency rule normally
18 accompanies a remand. *Se. Alaska Conservation Council v. U.S. Army Corps of Eng’rs*,
19 486 F.3d 638, 654 (9th Cir. 2007), *rev’d and remanded on other grounds sub nom. Coeur*
20 *Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009); *Alsea Valley All.*
21 *v. Dep’t of Commerce*, 358 F.3d 1181, 1185 (9th Cir. 2004). This is because “[o]rdinarily
22 when a regulation is not promulgated in compliance with the APA, the regulation is
23 invalid.” *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995). The

24
25 ²¹ CBD asks the Court to vacate (1) the challenged provisions of the Revised 10(j)
26 Rule (50 C.F.R. § 17.84(k)(9)(iii) (imposing population cap); 50 C.F.R. § 17.84(k)(7)(vi)
27 (allowing taking in response to ungulate impacts); and 50 C.F.R. § 17.84(k)(9)(iv)
28 (providing for phased management in Arizona); and (2) the challenged provision of the
section 10(a)(1)(A) permit restricting Mexican wolf occupancy outside the experimental
population area in areas north of Interstate 40. (Doc. 115, p. 47.) WEG similarly requests
that the Court “set aside portions of the revised rule, portions of the section 10(a)(1)(A)
permit, . . . and remand this matter back to the Service for further proceedings and
analysis” (Doc. 112, p. 50.)

1 usual effect of invalidating an agency rule is to reinstate the rule previously in force.
2 *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005).

3 When equity demands, however, the regulation can be left in place while the
4 agency reconsiders or replaces the action, or to give the agency time to follow the
5 necessary procedures. *See Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th
6 Cir. 2010); *Idaho Farm Bureau Fed’n*, 58 F.3d at 1405. A federal court “is not required
7 to set aside every unlawful agency action,” and the “decision to grant or deny injunctive
8 or declaratory relief under APA is controlled by principles of equity.” *Nat’l Wildlife*
9 *Fed’n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) (citations omitted). “A plaintiff
10 seeking a preliminary injunction must establish that he is likely to succeed on the merits,
11 that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
12 balance of equities tips in his favor, and that an injunction is in the public interest.”
13 *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). Harm to endangered or
14 threatened species is considered irreparable harm, and the balance of hardships will
15 generally tip in favor of the species. *See Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073
16 (9th Cir. 1996) (“Congress has determined that under the ESA the balance of hardships
17 always tips sharply in favor of endangered or threatened species.”); *Amoco Prod. Co. v.*
18 *Vill. of Gambell, AK*, 480 U.S. 531, 545 (1987) (“Environmental injury, by its nature, can
19 seldom be adequately remedied by money damages and is often permanent or at least of
20 long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance
21 of harms will usually favor the issuance of an injunction to protect the environment.”);
22 *see also, e.g., Defs. of Wildlife v. Sec’y, U.S. Dep’t of the Interior*, 354 F. Supp. 2d 1156,
23 1174 (D. Or. 2005) (lethal and non-lethal harm to gray wolf found to be irreparable injury
24 that warranted injunction and *vacatur* of final rule changing status of gray wolf from
25 endangered to threatened in some regions); *Hoopa Valley Tribe v. Nat’l Marine Fisheries*
26 *Serv.*, No. 16-CV-04294-WHO, 2017 WL 512807, at *24 (N.D. Cal. Feb. 8, 2017)
27 (“Evidence that the Coho salmon will suffer imminent harm of any magnitude is
28 sufficient to warrant injunctive relief.”).

1 Here *vacatur* of the 2015 rule and return to the provisions of the 1998 rule would
2 constitute a further setback for the species that serves no purpose. *Sierra Forest Legacy v.*
3 *Sherman*, 951 F. Supp. 2d 1100, 1107 (E.D. Cal. 2013) (rejecting *vacatur* of management
4 framework that was “environmentally preferable” to the prior one). Instead, the Court
5 will remand and require the agency to address the deficiencies discussed herein within a
6 reasonable time.²² This approach will also give the agency the opportunity to coordinate
7 any remedial action with the recovery recommendations in the recently published revised
8 recovery plan. Accordingly, the final rule shall remain in effect until the Service issues a
9 new rulemaking, at which time the January 16, 2015 final rule will be superseded.

10 Because further agency action will be required, the Court will not reach the
11 parties’ challenges to the November 17, 2014 Biological Opinion or the parties’
12 arguments under NEPA.

13 CONCLUSION

14 While the prospect of further delays in wolf recovery is discouraging, it is not the
15 province of this Court to make policy decisions, but to ensure compliance with statutory
16 requirements. Where, as here, the agency achieved an outcome that fails to adhere to the
17 guidelines set by Congress, the Court may not uphold that action, no matter how carefully
18 negotiated or hard-fought it may have been. For all of the reasons stated herein,

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20 ²² The Court declines Plaintiffs CBD and WEG’s request to sever and vacate the
21 challenged portions of the Section 10(j) rule. The Court concludes that the equities
22 weigh in favor of retention of the current rule, including the challenged provisions, as
23 these provisions are unlikely to cause irreparable harm in the near future. With regards to
24 the population cap and the limitation on dispersal north of I-40, the number of wolves in
25 the experimental population is not expected to reach 300-325 wolves until year 13 of the
26 program and the agency anticipates that few wolves will initially disperse north of I-40
27 under the phased management approach. With respect to the provision that allows for
28 take in response to unacceptable impacts to wild ungulate herds, the evidence suggests
that since reintroduction commenced, there has been “no discernable impact” from
Mexican wolf predation on elk in the BRWRA, and it is anticipated that wolves will have
little or no effect on the abundance of elk and deer across most of Arizona and New
Mexico. Moreover, it is clear that in drafting the present Section 10(j) rule, the take
provisions are critical to conciliating those opposed to the reintroduction effort, and
severing them would be contrary to the agency’s intent to draft a rule that furthers the
effectiveness of the reintroduction effort. See *MD/DC/DE Broadcasters Assoc. v. FCC*,
236 F. 3d 13, 22 (D.C. Cir. 2001) (whether the offending portion of a regulation is
severable depends upon the intent of the agency).

1 **IT IS ORDERED** as follows:

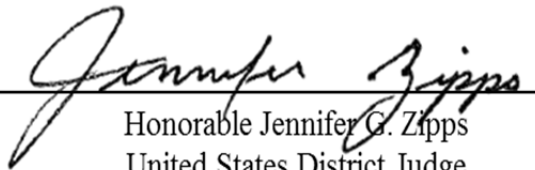
- 2 1. In lead case No. CV-15-00019-TUC-JGZ, Plaintiff CBD's Motion for Summary
3 Judgment (doc. 114) is GRANTED IN PART and DENIED IN PART to the
4 extent provided herein. Federal Defendants' Cross-Motion for Summary Judgment
5 (doc. 123) is DENIED. Defendant-Intervenor Arizona's Cross-Motion for
6 Summary Judgment (doc. 129) is DENIED.
- 7 2. In consolidated case No. CV-15-00285-TUC-JGZ, Plaintiff WEG's Motion for
8 Summary Judgment (CV-15-00019-TUC-JGZ, doc. 111) is GRANTED IN PART
9 and DENIED IN PART to the extent provided herein. Federal Defendants' Cross-
10 Motion for Summary Judgment (CV-15-00019-TUC-JGZ, doc. 133) is DENIED.
11 Defendant-Intervenor Arizona's Cross-Motion for Summary Judgment (CV-15-
12 00019-TUC-JGZ, doc. 141) is DENIED.
- 13 3. In consolidated case No. CV-15-00179-TUC-JGZ, Plaintiff the Coalition's Motion
14 for Summary Judgment (CV-15-00019-TUC-JGZ, doc. 108) is DENIED. Federal
15 Defendants Cross-Motion for Summary Judgment (CV-15-00019-TUC-JGZ, doc.
16 137) is GRANTED IN PART and DENIED IN PART to the extent provided
17 herein. Defendant-Intervenor CBD's Cross-Motion for Summary Judgment (CV-
18 15-00019-TUC-JGZ, doc. 147) is GRANTED IN PART and DENIED IN PART
19 to the extent provided herein.
- 20 4. In related case No. CV-16-00094-TUC-JGZ, Plaintiff SCI's Motion for Summary
21 Judgment (doc. 67) is DENIED. Federal Defendants Cross-Motion for Summary
22 Judgment (doc. 70) is GRANTED IN PART and DENIED IN PART to the extent
23 provided herein. Defendant-Intervenor CBD's Cross-Motion for Summary
24 Judgment (doc. 78) is GRANTED IN PART and DENIED IN PART to the extent
25 provided herein.

26 **IT IS FURTHER ORDERED** that the January 16, 2015 final rule, 80 Fed. Reg.
27 2512, *et seq.*, is hereby REMANDED to the Service for further action consistent with this
28 order. The final rule shall remain in effect until the Service issues a new final rule for the

1 experimental population of Mexican gray wolves, or otherwise remedies the deficiencies
2 identified in this Order, at which time the January 16, 2015 final rule will be superseded.

3 **IT IS FURTHER ORDERED** that within 30 days of the date of this Order, the
4 parties shall provide to the Court a proposed deadline for the publication of a revised
5 10(j) rulemaking or other remedial action.

6 Dated this 31st day of March, 2018.

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10 Honorable Jennifer G. Zipp
11 United States District Judge
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